No. 95-789

In The

Supreme Court of the United States

October Term, 1995

STATE OF CALIFORNIA, DIVISION OF LABOR STANDARDS ENFORCEMENT, DIVISION OF APPRENTICESHIP STANDARDS, DEPARTMENT OF INDUSTRIAL RELATIONS, COUNTY OF SONOMA,

Petitioners,

v.

DILLINGHAM CONSTRUCTION, N.A., INC., MANUEL J. ARCEO, dba SOUND SYSTEMS MEDIA,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF AMICUS CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether ERISA preempts those portions of California's prevailing wage law, California Labor Code Section 1720, *et seq.*, which grant an apprenticeship exemption to the prevailing wage rate for only those apprentices employed in a bona fide apprenticeship program registered with the State of California.

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I. INTEREST OF AMICUS CURIAE

With the written consent of all parties, Amicus Curiae California Apprenticeship Coordinators Association (hereinafter "CACA") and the Foundation for Fair Contracting (hereinafter "FFC"), file the following brief in support of the Petition for Writ of Certiorari of the California Department of Industrial Relations (hereinafter "DIR"), Division of Labor Standards Enforcement (hereinafter "DLSE"), and the County of Sonoma (hereinafter "County") to review the June 7, 1995 decision of the Ninth Circuit Court of Appeals in *Dillingham Construction v. County of Sonoma*, 57 F.3d 712 (9th Cir. 1995), reprinted in the Appendix to the Petition for Writ of Certiorari ("App.") at App. 1-12.

CACA is a California nonprofit corporation whose members represent labor-management joint apprenticeship committees ("JAC's") from all of the California construction industry's union/management joint apprenticeship programs. CACA represents over fifty JAC's under whose auspices 25,000 registered apprentices are being trained throughout the State of California.

The member JAC's of CACA are governed by committees consisting of equal numbers of union representatives and management representatives. The labor organizations represent the apprentices registered in programs approved by the State of California. The management representatives represent the contractors who employ such apprentices on both private and public construction work in the State of California. Those contractors who perform public construction work in California are governed by the prevailing wage requirements found

in California Labor Code section 1720, *et seq*. They benefit from the apprenticeship exemption from the prevailing wage requirement which was challenged in this litigation.

The Foundation for Fair Contracting ("FFC") is a joint labor-management California non-profit corporation which monitors public works projects to determine whether contractors are complying with California's prevailing wage laws. The employer member organizations of FFC include the Associated General Contractors of California, the Association of Engineering Construction Employers and the Engineering and Utility Contractors Association. The members of these associations serve on the JAC's and employ apprentices on both private and public construction work throughout Northern California. The union member organizations of FFC include Operating Engineers Local Union No. 3, Northern California District Council of Laborers, Northern California District Council of Cement Masons and the California and Vicinity District Council of Ironworkers. All of these unions participate in state approved apprenticeship programs.

Both CACA and FFC believe that the prevailing wage laws and the regulation of apprenticeship programs are important to the taxpayers and citizens of California since they provide a mechanism to allow public agencies in California to contract for meaningful training of young people, minorities and women on state public works construction.

The State of California permits contractors to pay rates lower than prevailing journeyman wage rates to apprentices registered with its Division of Apprenticeship

Standards ("DAS"). The State has a vested interest in allowing contractors to pay a lower wage rate to apprentices in training during their apprenticeship, because it encourages on-the-job training on public works projects.

The Ninth Circuit decision in *Dillingham* will create chaotic conditions in the construction industry. Contractors who employ apprentices will be working under different regulatory requirements, depending upon whether a project is state-funded and governed by the State's prevailing wage laws or is federally funded and subject to the prevailing wage requirements of the federal Davis Bacon Act, 40 U.S.C. § 276a, *et seq*. *Dillingham* will allow unscrupulous employers to evade the prevailing wage law by enrolling their employees in unapproved sham apprenticeship programs which will permit them to claim the apprenticeship exemption.

CACA and FFC are concerned about the continued viability of their members' JAC's and the potential loss of millions of dollars invested in training centers, staff and equipment which have been utilized to train over 25,000 registered apprentices throughout the State of California.

Before the *Dillingham* decision, State approval of each apprenticeship program and registration of apprentices was a precondition for exemption from the prevailing wage law. Only contractors who were certified to train apprentices under the standards of an apprenticeship program approved by the State of California, Division of Apprenticeship Standards, were allowed to pay less than the prevailing journeyman wage rate for work performed by apprentices. This assured that only bona fide apprenticeship programs would qualify for the reduced rate.

Because of the *Dillingham* decision, confusion and uncertainty exists among CACA's and FFC's labor and management representatives as to how the State of California will enforce the prevailing wage requirements for apprentices. *Dillingham* will make it possible for contractors to establish sham apprenticeship programs which will not provide training to workers, and which will allow contractors to pay any apprentice wage rate they choose, thereby creating a competitive advantage for those contractors not interested in providing meaningful training opportunities for young people, minorities and women.

II. STATEMENT OF THE CASE

In April 1987, Respondent Dillingham Construction N.A., Inc. (hereinafter "Dillingham"), entered into a public works contract with Petitioner County for the construction of the Sonoma County Main Adult Detention Facility. Dillingham subcontracted part of the work to Elenex Corporation, which in turn subcontracted to Manuel J. Arceo dba Sound Systems Media ("Sound Systems"). *Dillingham, supra,* 57 F.3d at 715-16. The project was subject to California's prevailing wage laws; all non-apprentice employees were required to be paid the predetermined prevailing wage.

On October 20, 1989, petitioner DLSE, after an investigation, filed a Notice to Withhold in the sum of $45,103.37 on the funds due Dillingham under the contract with the County, pursuant to California Labor Code section 1727, for the failure of Sound Systems to pay the prevailing wage rates. California Labor Code section 1775

makes Dillingham liable for the failure of its subcontractors to pay prevailing wages. The County withheld the funds as required by law. *See* California Labor Code section 1727. Dillingham and Sound Systems contested the notice, arguing that some of the Sound Systems workers were "apprentices," and that they were entitled to pay them less than the journeyman rate. The workers were not indentured as apprentices under State law and were not receiving state-approved training.

Dillingham and Sound Systems filed suit against the petitioners, alleging that the state's right to enforce the prevailing wage law is preempted by Section 514(a) of ERISA, 29 U.S.C. § 1144(a) because such enforcement would "relate to" an employee benefit plan. Petitioners now seek review in this Court.

III. REASONS FOR GRANTING THE WRIT

A. Certiorari Should be Granted to Establish that ERISA does not Preempt California's Prevailing Wage Law which Provides an Exemption to the Prevailing Wage Rate for only those Apprentices Employed in a Bona fide Apprenticeship Program Registered with the State of California.

The Ninth Circuit's decision in *Dillingham* held that the State of California could not exempt from the prevailing wage requirements only those apprentices working for employers who provide training pursuant to State approved apprenticeship programs. Simplisticly applying the test of whether state prevailing wage enforcement "relates to" an employee benefit plan, the Court concluded, with very little analysis, that ERISA preempts state apprenticeship wage enforcement. In doing so, the

Court ignored the State's paramount interest in assuring that all employees receive a fair wage, and that employers not be permitted to evade the prevailing wage requirement by dubbing some workmen "apprentices" when there is no evidence that they are receiving any approved apprenticeship training whatsoever. The effect of the decision is to authorize an employer to pay apprentice wages to workers it claims are "apprentices," even when their "apprenticeship program" is not approved by the State of California, and even where there is no proof that the employer has any training program established, or has trained any apprentices.

This Court recently noted that the concededly broad reach of ERISA preemption is not limitless, and cannot appropriately be used to eradicate significant state programs which impact on employee benefit plans in only peripheral ways. *See N.Y. Conference of Blue Cross v. Travelers Ins. (Travelers)*, ___ U.S. ___, 115 S. Ct. 1671 (1995). Like *Travelers, Dillingham* presents the Court with an instance in which ERISA preemption will create great mischief while providing no significant benefit to the federal scheme of ERISA enforcement.

B. The Court Should Grant Certiorari to Reconcile Conflicting Decisions in the Lower Courts.

Review by this Court is necessary in order to reconcile the conflicting decisions of the circuit courts with regard to ERISA preemption of state prevailing wage laws and the authority of the states to regulate apprenticeship programs.

In *Minnesota Chapter of Associated Builders and Contractors, Inc. (ABC) v. Minnesota Department of Labor and Industry (Minnesota)*, 47 F.3d 975 (8th Cir. 1995), *reh'g and sugg. for reh'g en banc denied* (Apr. 3, 1995), the court held that ERISA did not preempt the Minnesota prevailing wage law provisions which granted an apprenticeship exemption to the prevailing wage rate for apprentices employed in a bona fide apprenticeship program registered with the U. S. Department of Labor or with a state apprenticeship agency. The Ninth Circuit's decision in *Dillingham* reaches an opposite conclusion under almost identical circumstances.

In *ABC v. Minnesota, supra*, the Court held that the Minnesota prevailing wage law does not affect relations between ERISA entities or alter the structure of ERISA plans merely because it requires an employer to compensate employees at the prevailing wage rate. *Id.*, 47 F.3d at 978. The court stated that imposition of any wage rate could potentially increase costs to the employer, but the incidental impact produced by the prevailing wage law was too tenuous, remote and peripheral to lead to preemption. *Id.* at 979, *citing Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 100, n.21 (1983), the court stated:

> "The regulation of labor on state-funded construction projects falls within the scope of the state's traditional police power which we must presume that Congress did not intend to preempt." *ABC v. Minnesota*, 47 F.3d at 979, *citing Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 740 (1985); *Firestone Tire & Rubber Co. v. Neusser*, 810 F.2d 550, 555 (6th Cir. 1987).

In determining whether Minnesota's prevailing wage law is preempted by ERISA because it "relates to" ERISA plans, the Eighth Circuit used a seven factor test previously applied in *Arkansas Blue Cross & Blue Shield v. St. Mary's Hospital, Inc.*, 947 F.2d 1341, 1344 (8th Cir. 1991), *reh'g denied* (Jan. 13, 1992), *cert. denied*, 112 S. Ct. 2305 (1992).

> "These factors include whether the state law: (1) negates an ERISA plan provision; (2) affects relations between primary ERISA entities; (3) changes the structure of ERISA plans; (4) affects ERISA plan administration; (5) affects ERISA plans economically; (6) exercise traditional state power; and (7) may be preempted consistent with other ERISA provisions. *Arkansas Blue Cross & Blue Shield*, 947 F.2d at 1344-45 (citations omitted). These factors must be assessed in light of the 'totality of the state statute's impact on the plan.'" *ABC v. Minnesota*, 47 F.3d at 978.

In applying this test, the Eighth Circuit found that prevailing wage law did not affect relations between ERISA entities, nor did it alter the structure of ERISA plans. *Id.* Furthermore, the court found the incidental impact on employers and ERISA plans by the prevailing wage law was "too tenuous remote and peripheral to lead to preemption." *Id.* at 979.

The Court went on to state:

> "Here, the purpose of ERISA is not hindered by the Minnesota prevailing wage statute. The goal of ERISA preemption is 'to ensure benefit plans will be governed by only a single set of regulations,' *FMC Corp.*, 498 U.S. at 60, 111 S. Ct. at 408, not to ensure employers uniform wage regulations across state or even county lines. The wage regulations of the Minnesota Prevailing Wage Law are simply a byproduct of our two-tiered federal system, which is not preempted by ERISA." *ABC v. Minnesota*, 47 F.3d at 979.

The Minnesota and California prevailing wage statutes are similar. In Minnesota and California, although the prevailing wage rate also includes a benefit component, benefits and wages can be used interchangeably to meet the required total prevailing wage "package." In *Keystone Chapter, Associated Builders and Contractors, Inc. v. Foley*, 37 F.3d 945 (3d Cir. 1994), the Third Circuit upheld a similar Pennsylvania prevailing wage statute and concluded:

> " . . . [T]he Act and regulations merely require that the Secretary set a prevailing wage that consists of a cash component and may include a benefits component. Employers must pay the cash component of the wage in cash, but they may pay the benefits component either in benefits or cash. Any benefits they provide, regardless of type, would count toward the benefits component . . . " *Keystone*, 37 F.3d at 956.

The court concluded that ERISA does not require "a state to ignore the existence of ERISA benefits when considering overall remuneration to workers," and held that "a state can set a minimum cash wage, and allow an employer the option of paying part of that in benefits," without triggering ERISA preemption.

The California apprenticeship exemption to the prevailing wage law provides the same benefits and coverage as the laws in Minnesota and Pennsylvania which were not found to be preempted by ERISA.

The U.S. Court of Appeals for the Tenth Circuit reached an opposite result in *National Elevator Industry, Inc. v. Calhoon*, 957 F.2d 1555, *cert. denied*, 113 S. Ct. 406 (1992), underscoring the need for Supreme Court review of the relationship between state prevailing wage laws, apprenticeship programs and ERISA's preemption clause.

C. Certiorari Should be Granted Because Preemption of the Apprenticeship Exemption to California's Prevailing Wage Law Would Impair the Purposes of the Fitzgerald Act.

The Fitzgerald Act, 29 U.S.C. § 50, *et seq.*, directs the Secretary of Labor "to formulate and promote the furtherance of labor standards necessary to safeguard the welfare of apprentices . . . to bring together employers and labor for the formulation of programs of apprenticeship, to cooperate with state agencies engaged in the formulation and promotion of standards of apprenticeship and to cooperate with the Secretary of Education in accordance with Section XVII of Title 20." The important federal interest in apprenticeship embodied in the Fitzgerald Act would be completely frustrated if state regulation of apprenticeship programs, which the Fitzgerald Act clearly contemplates and encourages, were to be preempted by ERISA. Moreover, the "savings clause" of Section 514(d) of ERISA, 29 U.S.C. § 1144(d) evidences Congress' intent not to disturb other federal

statutory schemes by inappropriate application of ERISA's preemption provision.

In *ABC v. Minnesota, supra*, the court took specific note of the federal interest, embodied in the Fitzgerald Act, in preserving apprenticeship programs.

> " . . . [T]he apprenticeship exemption provisions of the prevailing wage statute are not preempted because preemption would impair the purposes of the Fitzgerald Act, 29 U.S.C. 50, in violation of ERISA's general savings clause. 29 U.S.C. at 1144(d).
>
> The ERISA savings clause provides that 'nothing in this subchapter shall be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States.' 29 U.S.C. at 1144(d). The district court concluded that preemption of the apprenticeship portion of the prevailing wage law would 'impair the cooperative state jurisdiction over apprenticeship programs envisioned by the Fitzgerald Act.' Minnesota Chapter, slip op. at 9 (Apr. 27, 1993). Thus, the district court held that the apprenticeship provisions are saved from preemption. *Id.*; 29 U.S.C. at 1144(d)." *ABC v. Minnesota*, 47 F.3d at 980.

The Eighth Circuit reached its conclusion by relying on the Ninth Circuit's decision in *Electrical Joint Apprenticeship Committee v. MacDonald*, 949 F.2d 270 (9th Cir. 1991), *cert. denied*, 505 U.S. 1204, 112 S. Ct. 2991 (1992). In *MacDonald*, the court applied ERISA's savings clause to avoid preemption of Nevada's apprenticeship exemption from the prevailing wage law. The Ninth Circuit should

have applied the same reasoning found in *ABC v. Minnesota* and *MacDonald*, and held that ERISA's savings clause saves California apprenticeship exemption from ERISA preemption.

IV. CONCLUSION

For all the foregoing reasons, Amici CACA and FFC respectfully request that the Court grant certiorari in this case.

Respectfully submitted,

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